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92-558

NO. ____-_____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

VALENTEC KISCO, INC.,

Petitioner,

v.

JAMES WILLIAMS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In ADEA cases, can a plaintiff prevail merely upon proof that his employer's reason for firing him was pretextual without evidence that age was a determining factor in the defendant's decision to fire plaintiff? In other words, does Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), require proof of "pretext-alone" or "pretext-plus"? This is the issue for which review is sought in this case.

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PETITION FOR WRIT OF CERTIORARI TO THE

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TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Valentec Kisco, Inc., hereby respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit.

OFFICIAL AND UNOFFICIAL CITATIONS

This case is not reported at this time.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Valentec Kisco invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1), seeking review of a final decision of a federal court of appeals in a civil case. Valentec Kisco is the party aggrieved by the decision.

The United States Court of Appeals for the Eighth Circuit denied the Suggestion for Rehearing on June 11, 1992 and entered that order on that date, having previously entered its decision on April 29, 1992.

This case involves the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-33 (1988) and West Supp. (1991). The act, in applicable part states that:

> It shall be unlawful for an employer -- (1) to . . . discharge any

> individual . . . because of an individual's age. 29 U.S.C. § 623.

The protected age group is employees over age forty (40).

This Federal Act also is the basis for federal jurisdiction in the court of first instance.

STATEMENT OF THE CASE

This case involves a labor dispute that arose between an entry level factory worker and his supervisor on or about March 11, 1987. The case was presented to a jury on the theories that the termination was racially motivated and intentionally age discriminatory. The jury returned a verdict in favor of the employer on the race cases; the jury gave a verdict in favor of the employee on the issue of age discrimination.

At the time of the incident Plaintiff was fifty-one (51) years of age, having

been hired at forty-three (43) years of age. Approximately one week prior to the incident, Mr. Williams transferred from third shift to second shift. Mr. Williams had expressed a preference for this shift, but in order to accommodate him, a second shift employee had to be displaced and Mr. Williams was assigned the displaced employee's job, that of sealer. On March 11, 1987, a dispute arose between the employee and supervisor regarding who, between them, is authorized to call for a tow-motor when Mr. Williams is in the bathroom. Mr. Williams then stated that he either would not or could not hand carry certain boxes to a pallet of goods which had been forklifted into the aisle approximately ten to twelve feet away. The supervisor, himself sixty-three (63) years of age, determined that Mr. Williams had insubordinately refused to carry out the work as directed and decided to

discipline him. In keeping with the company procedures, the employee secured a union representative and the company secured a supervisor for the serving of the notice of discipline. This latter supervisor was overheard by the Plaintiff asking Plaintiff's supervisor "what are you doing with an old man carrying the boxes any way?" There is no evidence that this statement was heard. Plaintiff's supervisor made no response but commenced talking with the union representative about a different topic.

Although the Plaintiff had turned in a full duty work release, he still considered himself restricted from lifting and told the jury that he was "not a well man." Mr. Williams told the jury that he was a long term employee that was doing the best he could to meet expectations, that he was still recuperating from an operation, and that all he wanted to do

was use a dolly to modify the method of performing the sealer job and that his supervisor would not let him do it. Moreover, in Mr. Williams' opinion, the company should have put him on an easier job in the first place in deference to his age.

Plaintiff presented no evidence that any employee who had ever refused to do a job was not similarly terminated, regardless of age. Plaintiff identified his immediate supervisor as the person who harbored age discriminatory intent against him, the supervisor, himself a man of sixty-three (63) years of age. The same sealer job, according to the testimony, was also done by a seventy-one (71) year old male who continues to remain in employment. Another employee older than Mr. Williams, who was approached about his desire to transfer to the second shift at the same time as Mr. Williams, remains in

the employ without incident. The record established that the company continued to retain in employment all who did their work without regard to age, except those who refused to do their jobs, who were all terminated without regard to age. Nevertheless, on June 13, 1990, the jury returned a verdict in favor of the Plaintiff on his age discrimination count. Timely notice of appeal was made to the Eighth Circuit Court of Appeals on October 5, 1990, and timely application for a Writ of Certiorari is now being made to this Court.

ARGUMENT FOR ISSUANCE OF THE WRIT

1. To resolve a long-standing conflict between circuits, within circuits, and within panels of circuits.

2. To assist judges, attorneys and parties in their work by resolving the

claimed ambiguity in the Texas Community Affairs v. Burdine decision.

3. To prevent the continuous over-benefiting or over-burdening of litigants depending upon the circuit in which the case is tried.

4. To relieve this applicant from an unjust debt.

* * *

This matter is of special interest because there is a notorious split on this issue between circuits, within circuits and between panels within the same circuit. The split has continued for over a decade, involves thousands of cases already, shows no sign of abating, and is likely to be a continuing source of consternation for parties, lawyers and judges as more and more employees use civil rights litigation as a response to the continuing vitality of employment at will doctrine. Two well written law

journal articles, each defending opposing positions, collect the arguments and authorities. See, Catherine J. Lanctot, The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases, 43 Hastings L. J. 59 (November, 1991); Francis M. Milone, Age Discrimination: Proving Pretext Under the ADEA, 13 Employee Relations Law Journal 104 (1987). Until this conflict is resolved, litigants will continue to be variously illegally overburdened or illegally overbenefitted, since "only one of these two rules can be correct as a matter of law," Lanctot, supra, at 67.

This Court is not unmindful of this disturbing situation and has at least twice ordered certiorari, only to have the order vacated other than on the merits. Chipollini v. Spencer Gifts, Inc., 814 F. 2d 893 (3rd Cir.) (en banc) cert.

dismissed 483 U.S. 1052 (1987); Brieck v. Harbison-Walker Refractories, 624 F. Supp. 363 (W.D. Pa. 1985) opinion amended 705 F. Supp. 269 (W.D. Pa. 1986) affirmed in part, reversed in part and remanded in part, 47 F.E.P. Cases (BNA) 1527 (3rd Cir. 1987); cert. dismissed 488 U.S. 226 (1988).

In this case, Valentec Kisco is aggrieved by denial of its j.n.o.v. motion, and will be constrained to pay an unjust money judgment, attorneys' fees, interest and face remand on front pay issues to a former employee whose evidence does not merit relief under the Age Discrimination in Employment Act, 29 U.S.C. Section 621, unless this Court in its discretion chooses to intervene.

The uncertainty of the U. S. Supreme Court's holding has special meaning to this applicant. At the time that Valentec Kisco terminated Plaintiff for misconduct,

March of 1987, the Eighth Circuit had consistently required plaintiffs to show not only that the reason articulated was pretextual, but also that age was the true reason. O'Conner v. Peru State College, 781 F. 2d 632 (8th Cir. 1986) ("AND THAT the employer actually was improperly motivated"); Washburn v. K.C. Life Insurance, 831 F. 2d 1404 (8th Cir. 1987) ("merely pretextual AND THAT age was a determining factor"). In fact, the trial judge who had been affirmed in O'Conner, supra, had ruled:

> Merely casting doubt on the employer's articulated reason DOES NOT SUFFICE to meet the plaintiff's burden of demonstrating discriminatory intent (citing White v. Vathally, 732 F. 2d 1037 [1st Cir. 1984]; cert. denied 469 U.S. 933 [1984]).

Nevertheless, in the instant case, the Eighth Circuit chose to impugn the logic of "other" circuits that have substituted the conjunction "or" found in Burdine,

with the conjunction "and," which would require the factfinder to determine not only that the employer's reason was unworthy or credence, but also that a discriminatory reason more likely motivated the employer. (Opinion, p. 7). The Eighth Circuit relied on its 1988 holding in MacDissi v. Valmont Industries, Inc., 856 F. 2d 1054 (8th Cir. 1988) and Brooks v. Woodline Motor Freight, Inc., 852 F. 2d 1061 (8th Cir. 1988) which in turn relies for support of the Seventh Circuit decision of LaMontagne v. American Convenience Products, 750 F. 2d 1405 at 1409-10 (7th Cir. 1984) which recites in obiter dicta:

> The special virtue of the indirect method of proof is that it allows victims of age discrimination to prevail without presenting any evidence that age was a determining factor in the employer's motivation.

This absurd holding is of doubtful continuing vitality even in the Seventh

Circuit. See, North v. Madison Area Assn. for Retarded Citizens-Developmental Ctrs. Corp., 844 F. 2d 401, 406 (7th Cir. 1988) (plaintiff's burden NOT MET simply by showing pretext; he must also show that "but for" discrimination he would not have been discharged); Beard v. Whitley County R.E.M.C., 840 F. 2d 405, 411 (7th Cir. 1988) ("We have held previously that pretext in this context means "pretext FOR DISCRIMINATION"); Friedel v. City of Madison, 832 F. 2d 965, 975 (7th Cir. 1987) ("Plaintiffs must allege and support NOT ONLY pretext, BUT ALSO that the [defendant's] actions were pretext FOR DISCRIMINATION BASED ON A prohibited characteristic . . . ."); Benzies v. Illinois Dept. of Mental Health & Developmental Disabilities, 810 F. 2d 146, 148 (7th Cir. 1987) cert. denied 483 U.S. 1006 (1987).

As if that were not enough, the Eighth Circuit saw fit to identify one of the sitting Supreme Court Justices by name and brand his legal reasoning in an opinion issued while a Circuit Judge on the issue as "clearly" not "accurate." (Opinion, p. 8).

Valentec Kisco seeks review of the Eighth Circuit's disposition of its case on the basis that the law does not require Williams to prove that age was a determining factor in Valentec Kisco's decision, so long as he discredited its stated reason for firing him. (Opinion, p. 8).

This is an illogical and incorrect interpretation of this Court's holding in Burdine, supra, for a number of reasons.

First of all, the misinterpretation is based on an isolated statement in Burdine that a plaintiff may prove discrimination either directly by persuading the

(factfinder) that a discriminatory reason more likely motivated the employer or indirectly "by showing that the employer's proffered explanation is unworthy of credence." Id., at 256.

This statement is true as far as it goes. The court was merely pointing out that a plaintiff's case will not automatically fail for want of direct evidence. In cases where the plaintiff has no direct evidence, he might still be eligible to prove his case indirectly, but certainly never where some proof does not go to refute the employer's non-discriminatory reason, since obviously "the reason" cannot be discriminatory and yet non-discriminatory at the same time. In other words, the Burdine Court was merely pointing out that proof of pretext is necessary, but not sufficient, for the indirect method of proof of discrimination to prevail.

This point is emphasized by the fact that the Burdine Court went on to identify just "what" is sufficient for an indirect method of proof: The plaintiff must prove "by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, BUT WERE A PRETEXT FOR DISCRIMINATION." Had the court intended to indicate that all a plaintiff needed to prevail was proof "that the legitimate reasons offered by the defendant were not its true reasons," the court would not have added the last six words -- "but were a pretext for discrimination." Furthermore, not only must "pretext-only" advocates eliminate six crucial words from the court's pronouncement, they must add one so that the court's language is altered to read that the plaintiff must prove "by a preponderance of the evidence ONLY that the legitimate reasons offered by the

defendant were not its true reasons . . . ." Had this been what the court intended to say, it would have been easy enough to have done so.

Secondly, the Burdine decision states repeatedly that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Logically, this could be accomplished merely upon discrediting the employer's stated reason if and only if employers only conceal discriminatory reasons for terminating employees. Thus, the pretext-only position is bottomed upon a false premise, since employers conceal reasons for firing employees for both discriminatory and nondiscriminatory reasons. The question asked by Justice Scalia in oral argument in Brieck, supra, remains urgent and unanswered: Why MUST one conclude that

the real reason is discrimination simply because I come up with a phony reason that you don't believe? Transcript of Oral Argument at 18-19 (quoted in Footnote 101, Lanctot, supra). Whatever may be said for the reason for a pretext-only rule in immutable (race or gender) status cases, there is no good reason for application to age cases:

> While the treatment of the aged in this nation has not been wholly free from discrimination, such persons, unlike, say those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful, unequal treatment" or have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities . . . . Old age does not define a "discreet and insular" group in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live out our normal span. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

In effect, then, for the pretext-only advocates to be correct, the plain

language of Congress in its Age Discrimination in Employment Act must be judicially rewritten so as to require employers to state the true reasons for terminations, even when those reasons may have nothing at all to do with age, race or gender, at the peril of a civil trial and money damages. This may be the language of some laws, such as the Missouri Service Letter Statute, R.S.Mo. Section 290.140; but it is NOT the language of the ADEA. In fact, this interpretation directly contravenes the plain language of the Act, which makes licit the termination for any reason other than a prohibited reason. 29 U.S.C. Section 621(f)(1).

If the pretext-only advocates are correct, then the focus of the trial is purely on the credibility of the employer's articulated reason for its actions in age discrimination cases, not

on the presence of any actual age discrimination. If this were so, then it is the employer who has the almost impossible burden of proving the absence of discriminatory motive. Yet the clear pronouncements elsewhere in Burdine hold that the burden is, on the contrary, at all times on the plaintiff. "The defendant need not persuade the (finder of fact) that it was actually motivated by the proffered reasons." "The plaintiff retains the burden of persuasion." Burdine, at 256. Contrary to the holding of the Eighth Circuit in this case, the credibility of the employer's reason is not dispositive, and that somewhere there must be some proof providing some linkage or nexus to age discrimination, which is, after all, the only relevant inquiry in age discrimination cases.

Burdine states that "the plaintiff must . . . prove BY . . . EVIDENCE that

the legitimate reasons offered" were a particular kind of pretext, a pretext for discrimination. One court has observed that "(d)isbelief of testimony, however, does NOT . . . constitut(e) evidence . . . ." Graham v. Renbrook School, 697 F. Supp. 102, note 7 (D.C. Conn. 1988). If additional "evidence" linking the employment decision to age discrimination were not required, it would have been wholly unnecessary for this Court to undertake the identification of at least four (4) kinds of such additional evidence in its decision in McDonnell Douglas v. Green, 411 S.W. 792 (1973), an earlier case involving another St. Louis military manufacturer.

Nor is it unfair to hold plaintiffs to their burden of proof. Trial attorneys and judges have been speaking out for some time about what is really going on in these cases. "(J)urors find it difficult

to close their hearts to the plight of the terminated older employee but easy to open the purse strings of his employer." Visser v. Packer Eng'g Assocs., 924 F. 2d 655, 660-1 (7th Cir. 1991) (Flaum with Bauer and Cudahy, dissenting). Judge Waters, in his dissent in Morgan v. Arkansas Gazette, 987 F. 2d 945 (8th Cir. 1990), observed that what juries are really deciding in ADEA cases is whether a plaintiff who has been employed for many years "should . . . have been fired (when) it wasn't 'fair' to do so." Judge Waters warned that today's employers who fire any employee over forty (40) years of age expose themselves "to a strong probability that the terminated employee will be able to find a jury that will determine, not whether the person was terminated because of his age, but a myriad of other 'fairness' issues, resulting in the expenditure of astronomical sums by that

employer because it made an employment decision."

One lawyer has written: "If a jury believes that the circumstances surrounding an employee's termination were unfair or appear to reflect an unwise business decision or absence of loyalty to a long term employee, the jury will have little difficulty in concluding that the employer's reasons were "not worthy of credence." Milone, Age Discrimination: Proving Pretext Under the ADEA, supra.

In Wehr v. Burroughs Corp., 477 F. Supp. 1012, 1019 (E.D. Pa. 1979); affirmed 619 F. 2d 276 (3rd Cir. 1980), yet another trial judge conceded that in an ADEA action by a single plaintiff against a large corporation, tried before a jury, "the likelihood of success is always reasonable."

Judge Scalia, in his dissent in Carter v. Duncan Higgins, Ltd.,. 727 F 2d 1225

(D.C. Cir. 1984), lamented that "without careful and conscientious fact-finding, the anti-discrimination laws can either be frustrated by, or converted into instruments of the very evil they are designed to prevent. (It is unfair for juries) to decide on the basis of sheer speculation, ultimately tipped in view of the impossibility of choosing rationally between two 'possibilities' by impermissible, but understandable, resort to such factors as sympathy and the like." For this reason, employers need zealous judicial review to counteract the juror willing to substitute his or her own brand of fair play for employer business decisions in the absence of proof of discrimination.

Employers throughout this country need the holding of Burdine clarified by this Court at this time. This case is not so fact-bound as to make difficult the announcement of a clear rule of law.

On the contrary, in an attempt to avoid reversal, and even though the court acknowledged that the case had not been tried on any theory of any direct evidence, the Eighth Circuit found so-called "direct evidence" of intentional age discrimination by Valentec Kisco in the solitary stray inquiry made by a non-decision maker, made after the decision had been made, calling into question the wisdom of assigning the sealer job to Plaintiff over a week earlier. Current day paranoia notwithstanding, it is not every reference to the age of a plaintiff which constitutes direct evidence of intentional discrimination. After the decision had been made by Mr. Williams' supervisor to terminate Williams for refusal to carry out an order, another supervisor from another part of the plant who had nothing to do with Mr. Williams or his supervisor was heard by Mr. Williams

as asking what his supervisor was doing "with an old man carrying the boxes anyway?" This lone utterance is neither derogatory nor pejorative.

"Courts have found only the most blatant remarks, whose intent could be nothing more than to discriminate on the basis of age, to constitute direct evidence of discrimination." Ruzicho & Jacobs, Litigating Age Discrimination Cases, (Callaghan & Co., Deerfield, Ill. 1991) (Cum. Supp. p. 3). Accordingly, much more direct reference to age (vice president said not to fire plaintiff "until he had a younger man to replace him," with a "bright, young individual") was found not to constitute direct evidence. LaMontange v. American Convenience Products, Inc., 750 F. 2d 1405, at 1409-10 (7th Cir. 1984).

Plaintiff presented no evidence that his supervisor even heard the question,

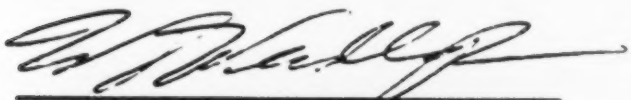
replied or otherwise acted in a manner which shows his adoption of or belief in the statement. Implicit in the question is the point that no stereotyping or prejudgment of abilities played a role in the supervisor's earlier decision called into question.

Incredibly, Plaintiff commenced this suit while still pro se believing that the Age Discrimination in Employment Act REQUIRED employers to paternalistically give the less strenuous jobs to older employees. Plaintiff complained to the Unemployment Compensation Commission and the EEOC that his job assignment had been given to him evenhandedly without regard to his age. Thus, there is no substantial direct or indirect evidence to support this award and the j.n.o.v. was improperly denied.

IN CONCLUSION, Valentec Kisco, Inc. respectfully requests that this Court choose to grant certiorari to review its decision obtained from the Eighth Circuit.

Respectfully submitted:

WILLIAM T. WEIDLE, JR.
ATTORNEY AT LAW



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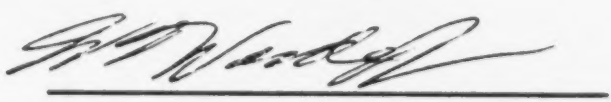
CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Petition for Writ of Certiorari were served upon Respondent James Williams by mailing same by ordinary first class mail, postage pre-paid to Mary Anne Lindsey, Esq., Evans & Dixon, Attorneys for Respondent, 1200 St. Louis Place, 200 North Broadway, St. Louis, Missouri 63102, on the 29th day of September, 1992.



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WILLIAM T. WEIDLE, JR.
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

(Submitted September 9, 1991)

(Filed April 29, 1992)

JAMES WILLIAMS, Appellee, v. VALENTEC KISCO, INC., Appellant.	Nos. 90-2909/ 2910/2911EMSL OPINION

Before ARNOLD,* JOHN R. GIBSON, and BEAM, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

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*The HONORABLE RICHARD S. ARNOLD became Chief Judge of the United States Court of Appeals for the Eighth Circuit on January 7, 1992

James Williams prevailed in his claim that he was discharged by Valentec Kisco, Inc., because of his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. §§ 621-33 (1988 & West Supp. 1991). However, the jury rejected his claim brought under 42 U.S.C. § 1981 (1988) that he was also discharged because of his race, and the magistrate judge[1] who tried the case entered a similar judgment on his Title VII race claim brought under 42 U.S.C. § 2000e-2 (1988). Valentec Kisco argues on appeal that it was entitled to judgment notwithstanding the verdict on the age claim. Williams argues that the magistrate judge erred in finding against him on his Title VII claim and in giving instructions on the section 1981 race claim

[1]A United States magistrate judge tried the case with the parties' consent pursuant to 28 U.S.C.A. § 636(c) (West Supp. 1991).

which did not properly inform the jury of the burden of proof and shifting burdens in such cases. Williams further argues that the magistrate judge erred in denying his motion for liquidated damages and front pay. We affirm the judgment of the magistrate judge in all respects except on the front pay issue, which we remand for reconsideration in accordance with our instructions.

We state the facts in the light most favorable to Williams as we are required to do under the standard set forth later in this opinion.

Valentec Kisco manufactures grenades and Army parts. Williams, a black man, had worked for Valentec Kisco for about twelve years, and was 51 years old at the time of the events at issue. Williams had been off work on medical leave because of job-related injuries and prostate surgery. When he returned, he worked on the second

shift for approximately four months and then switched to the third shift to avoid working overtime. His regular job on the second shift had been to check the quality of grenades coming down the lines. He asked to be transferred back to the second shift and was told that the only job available was a sealer position. That position entails taking boxes of hand grenades and sealing them by placing aluminum foil bags on each box. The box is then sent to the second sealer who vacuum seals the box, places it in another box, and tapes the outside box. The sealer then loads the box onto a skid located next to the assembly line. Each box holds approximately 200 grenades and weighs approximately 67 pounds. When the skid is full, a tow loader moves it away from the line, and an empty skid is then moved in place for loading.

Williams told his supervisor, Leigh, that he would prefer to stay on the third shift if the sealer position was the only job available during the second shift, because his medical condition made lifting difficult. Leigh told Williams that he had to return to the second shift. Although Leigh testified that Williams requested the change back to the second shift, there was no documentation in the file regarding the change, and no explanation for the lack of documentation.

On March 11, 1987, Williams reported for work and Leigh assigned him his duties. After about two and a half to three hours Williams took a break to go to the restroom. Before he left there was a nearly full skid that he had been loading approximately two feet from his position on the line. When he returned from the restroom the skid had been moved twelve feet from its earlier position and no new skid was

put in its place. Leigh told Williams that he had ordered the skid moved in his absence, and when Williams asked why, Leigh said, "I do like I want to." Customarily, one of the sealers instructed that the skid be moved away from the line when it was nearly full.

Williams then obtained a two wheeler hand dolly located some ten feet from the assembly line, intending to use it to place boxes on the dolly and move them from the line to the skid. Leigh told him he could not use the dolly and made Williams accompany him to the office, where they were joined by Sam Asbrock, a foreman, and the shop steward. Leigh told Asbrock what had happened and that Williams refused to do his job. Asbrock asked Leigh what he was doing with an old man carrying the boxes anyway. When the shop steward asked Leigh why he objected to Williams' using the two wheeler, Leigh stated that he was going to

"fire this son of a bitch." Leigh then told Williams to leave the plant, and Williams left.

Leigh suspended Williams pending an investigation and prepared a disciplinary report showing that Williams refused to accept his job assignment. Williams told Leigh that day that he was having medical problems and Leigh wrote on the report that Williams informed him he was unable to do the job. There was evidence that the two wheeler was used to move grenades from place to place within the factory, and to pick up grenade parts. There was no written rule prohibiting employees from using the two wheeler to move boxes of grenades from the line to the skid, and nothing in Valentec Kisco's literature stated that the two wheeler could not be used in this fashion due to any safety hazards. The company safety rules did not prohibit the use of the two wheelers, but

they did state that employees were not to attempt to lift weights that were too heavy for them. Williams had used the two wheeler to move grenades from one place to another while working the second shift earlier in the week, and no one had ever told him that he could not use the two wheeler in that fashion. Valentec Kisco eventually terminated Williams and replaced him with a 30-year-old male, who left shortly thereafter on medical leave, and was in turn replaced by a 20-year-old white male. Williams made efforts to be reinstated, but was unsuccessful. He then commenced this action.

The issues submitted to the jury were whether age or race were "determining" or "motivating" factors in Williams' discharge. The jury was also instructed that defendant claimed that the sole reason for the termination was refusal to perform a job as directed by his supervisor, and that

plaintiff had the burden to prove that this was mere pretext or coverup for the discharge. The jury found for Williams on his age discrimination claim and determined Valentec Kisco's conduct to be willful. However, the jury rejected Williams' section 1981 race discrimination claim. The magistrate judge entered judgment for Valentec Kisco on the Title VII race discrimination claim, holding that because of the jury verdict on the section 1981 claim, collateral estoppel required a finding of no discrimination for the Title VII claim as well. The jury assessed Williams' damages at $85,000. The magistrate judge ruled that Williams had waived any claim to liquidated damages when his counsel stated on the record that he would not pursue punitive damages on either the race or age claim pursuant to an agreement that certain evidence would be excluded from trial in return for this stipulation.

I.

Valentec Kisco argues that the magistrate judge erred in failing to grant its motion for judgment notwithstanding the verdict since there was no "competent and substantial" evidence to support a finding of pretext or intentional age discrimination.

As age discrimination case may proceed to trial on two paths: one involving direct evidence and the other using the three stage order of proof and presumptions that arise therefrom under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the latter method, the plaintiff has the initial burden of proving a prima facie

case.[2] The burden of production then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employer's rejection." Id. at 802. The employee must then rebut the employer's reason by proving that his articulated reason was mere pretext. Id. at 804; Hall v. American Bakeries Co., 873 F. 2d 1133, 1134 (8th Cir. 1989) (applying McDonnell Douglas standard of proof in age discrimination cases). Valentec Kisco's arguments pertain primarily to this shifting burden analysis.

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[2]The four basic elements of plaintiff's prima facie case are:

(1) that he or she is within the protected age group, (2) that he or she met applicable job qualifications, (3) that despite these qualifications, he or she was discharged, and (4) that, after the discharge the position remained open and the employer continued to seek applications from persons with similar qualifications.

Dace v. ACF Industries, Inc., 722 F. 2d 374, 377 (8th Cir. 1983) (quoting Cova v. Coca-Cola Bottling Co., 574 F. 2d 958, 959 (8th Cir. 1978).

Our earlier cases make clear the scope of our review regarding this issue. As we said in Barber v. American Airlines, Inc., 791 F. 2d 658, 659 (8th Cir.), cert. denied, 479 U.S. 885 (1986), in considering submissibility of an age case:

> [W]e are concerned primarily with the simple question whether the record contains enough evidence to justify a rational jury in finding that age was a determining factor in what happened to plaintiff[], a factor in the absence of which the employer would not have taken the adverse action it did.

See also Morgan v. Arkansas Gazette, 897 F. 2d 945, 948 (8th Cir. 1990) (once there has been finding of discrimination, on appellate review, three-stage order of proof and presumptions arising therefrom fade away). All we are to focus upon is whether there was sufficient evidence to support the jury's finding of intentional discrimination. Id.; Bethea v. Levi Strauss & Co., 827 F. 2d 355, 358 (8th Cir. 1987); Barber, 791 F. 2d at 660. See

United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 714-15 (1983). In Morgan, we set forth the standard guiding our review of jury verdicts. This standard requires that we:

> (1) consider the evidence in the light most favorable to [Williams], who prevailed with the jury; (2) assume that all conflicts in the evidence were resolved by the jury in [Williams'] favor; (3) assume as proved all facts which [Williams'] evidence tends to prove; (4) give [Williams] the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and (5) affirm the denial of the motion if reasonable persons could differ as to the conclusions to be drawn from it.

897 F. 2d at 948 (quoting Gilkerson v. Toastmaster, 770 F. 2d 133, 136 (8th Cir. 1985)). We further stated in Morgan that the court should consider only the evidence favoring the nonmoving party. 897 F. 2d at 948.

We have set forth above the evidence in a light most favorable to Williams under the standards articulated in Morgan and

Barber. We confess that the case is close. The evidence certainly supports a conclusion that the supervisor, Leigh, was arbitrary in moving the skid and in forbidding Williams from using the dolly to move the boxes from the line to the skid. The evidence could support an inference that there was some bad blood between Leigh and Williams in this respect. Leigh made several other arbitrary actions in which he made clear that he was requiring Williams to make shift changes or use equipment exactly as Leigh desired, and failed to require Williams to seek medical attention when informed that Williams was having medical problems.

Valentec Kisco's articulated legitimate nondiscriminatory reason for terminating Williams was that he disobeyed direct orders from Leigh. The evidence we recited above is sufficient to support a finding that this stated reason was pretextual.

Valentec Kisco argues, however, that the plaintiff cannot prevail only by proving pretext, but must also prove that age was a determining factor in the employer's decision to fire the employee. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), holds that the plaintiff may prove discrimination "either directly by persuading the [factfinder] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. at 256 (emphasis added). Aikens reasserts Burdine's holding that a plaintiff may prove discrimination indirectly by showing that the articulated explanation for discharge is unworthy of belief. 460 U.S. at 716.

Valentec Kisco relies on cases from circuits that have replaced the conjunction "or" found in Burdine with "and," requiring

the plaintiff to persuade the factfinder both that a discriminatory reason more likely motivated the employer, and show that the employer's proffered reason was unworthy of credence. See, e.g., Bienkowski v. American Airlines, Inc., 851 F. 2d 1503, 1508 (5th Cir. 1988); White v. Vathally, 732 F. 2d 1037, 1042-43 (1st Cir.), cert. denied, 469 U.S. 933 (1984). Valentec Kisco argues that our circuit subscribes to this requirement of an additional showing of age as a determining factor in the discharge, which one writer has referred to as the "pretext-plus" theory.[3] To the contrary, we have rejected such an argument. In MacDissi v. Valmont Industries, Inc., 856 F. 2d 1054 (8th Cir. 1988), we stated that an "employer's sub-

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[3] See Catherine J. Lanctot, The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases, 43 Hastings L.J. 59, 64-68 (1991).

mission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." Id. at 1059. MacDissi based this statement on an accurate reading of Burdine, 450 U.S. at 256. See also Goetz v. Farm Credit Servs., 927 F. 2d 398, 400-01 (8th Cir. 1991); Morgan, 897 F. 2d 951-2 (quoting the above language from MacDissi). But see Gray v. University of Arkansas, 883 F. 2d 1394, 1402 (8th Cir. 1989) (hinting at a pretext-plus approach). We recognize that, while a federal circuit judge, Justice Scalia indicated that he favored a "pretext-plus" approach. See Carter v. Duncan-Higgins, Ltd., 727 F. 2d 1225, 1245-47 (D.C. Cir. 1984) (Scalia, J., dissenting). Nonetheless, Burdine clearly does not support a pretext-plus approach. We reject Valentec Kisco's contention that Williams had to

both discredit its stated reason for firing him and prove that age was a determining factor in Valentec Kisco's decision.

In addition to this evidence of pretext, however, Asbrock questioned Leigh as to what he was doing "with an old man carrying the boxes anyway?" Asbrock was another supervisor who also signed the disciplinary report. The issue presents itself as to whether this is direct evidence of a discriminatory intent.[4] See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (plaintiff using direct evidence of discrimination need not rely on McDonnell Douglas shifting burdens of proof); Perry v. Kunz, 878 F. 2d 1056, 1058-59 (8th Cir. 1989) (same). See also Beshears v. Asbill, 930 F. 2d 1348, 1354 (8th Cir. 1991) (direct evidence of discri-

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[4]Direct evidence is also used in "mixed motive" cases. See Price Waterhouse v. Hopkins, 490 U.S. 228, 259 (1989).

mination can include employer's remarks reflecting discriminatory attitude). Williams did not submit a direct evidence theory. Asbrock's statement, however, could fairly be considered as direct evidence of discriminatory intent, and provides an independent basis to support the jury's finding of pretext.

Valentec Kisco asserts additional arguments that merit little discussion. For instance, Valentec Kisco argues that the magistrate judge erred in failing to admit evidence that Leigh could not know the identity of Williams' replacement. This argument is an attack on Williams' prima facie case, which is irrelevant at this state. See Aikens, 460 U.S. at 714-15; Morgan, 897 F. 2d at 948 (appellate court will not assess adequacy of a party's showing at any particular state of McDonnell Douglas analysis). Valentec Kisco also argues that Asbrock's comment

was not discriminatory, but was actually made on behalf of Williams. This asks us to make our own factual and credibility determinations, which we may not do. Neither will we probe into policy issues regarding the ADEA, as Valentec Kisco invites us to do. Suffice it to say that we conclude that there was sufficient evidence to support the jury's conclusion that Williams' age was a determining factor in the loss of his job.

II.

Williams argues that the magistrate judge erred in denying his motion for liquidated damages and front pay.

A.

Williams claims that he was entitled to liquidated damages because the jury unanimously found that Valentec Kisco's discriminatory conduct was willful. Liquidated damages are allowable under the ADEA only for "willful violations." 29 U.S.C. §

626(b); Bethea v. Levi Strauss & Co., 827 F. 2d 355, 358 (8th Cir. 1987). Liquidated damages serve as a deterrent to willful violations of the Act, see Trans World Airlines, 469 U.S. at 125, and while there is an aspect to such damages that is punitive in nature, Rademaker v. Nebraska, 906 F. 2d 1309, 1313 (8th Cir. 1990), they are not the equivalent of punitive damages. See Bruno v. Western Elec. Co., 829 F. 2d 957, 967 (10th Cir. 1987). Punitive damages as such are not recoverable under the ADEA. See generally 29 U.S.C. §§ 621-34.

The magistrate judge determined that Williams' counsel waived the right to liquidated damages by stipulating before trial that he would not seek punitive damages. Williams' counsel stated on the record that he would not pursue punitive damages on either the race claim or the age claim. The record indicates, however, that

counsel intended to waive only punitive damages on both counts, as he stated: "I want to make clear that the allegations of intentional acts on the age claim would still stand, and we'd still be asking for damages on that." Additionally, the magistrate judge allowed Williams to submit a special interrogatory on the verdict form asking the jury to determine whether Valentec Kisco's violation was "willful." We do not read this stipulation as foreclosing consideration of liquidated damages, and are satisfied that the magistrate judge erred in concluding that it did.

We entertain serious question, however, as to whether the evidence is sufficient to support the jury's finding of willfulness. In Morgan v. Arkansas Gazette, we discussed the standard for determining whether an ADEA violation is willful. 897 F. 2d at 952. We stated that "[a] violation is

willful if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" Id. (citations omitted). "'Thus, in order that the liquidated damages be based on evidence that does not simply duplicate that needed for the compensatory damages, there must be some additional evidence of the employer's "reckless disregard."'" Id. (citations omitted). While we believe that foreman Asbrock's statement about an old man carrying the boxes is direct evidence of age based animus, it is insufficient to establish a willful violation of the Act. We thus affirm the denial of liquidated damages for willfulness on the basis that there was no evidence to support such a finding.

B.

The magistrate judge also denied Williams' motion for an award of front pay because Williams had not requested

reinstatement in his pleadings. Relying on a Third Circuit case and two district court decisions, the magistrate judge determined that a claim for reinstatement is a prerequisite to receiving a front pay award. E.g., Wehr v. Burroughs Corp., 619 F. 2d 276, 283 (3d Cir. 1980). We have never addressed this specific question, but we note that the Tenth Circuit views the issue differently than does the Third Circuit. EEOC v. Prudential Federal Sav. & Loan Ass'n, 763 F. 2d 1166, 1173 n. 2 (10th Cir.) (plaintiff "need not 'request reinstatement as a prerequisite to obtaining front pay where the evidence reveals an atmosphere of hostility'"), cert. denied, 474 U.S. 946 (1985) (citation omitted).

We have held that in fashioning equitable relief for the plaintiff, the court may grant reinstatement or monetary damages in lieu of reinstatement, Gibson v. Mohawk Rubber Co., 695 F. 2d 1093, 1100

(8th Cir. 1982), tailoring the remedy to "make the injured party whole." Brooks v. Woodline Motor Freight, Inc., 852 F. 2d 1061, 1065 (8th Cir. 1988). We have recognized that reinstatement is sometimes not an appropriate remedy, as when there is "evidence of extreme animosity between plaintiffs and defendant employers." Dickerson v. Deluxe Check Printers, Inc., 703 F. 2d 276, 281 (8th Cir. 1983). We have also said that a plaintiff who is granted reinstatement cannot also receive an award of front pay. Morgan, 897 F. 2d at 954. However, we have never said that the failure to request reinstatement is an absolute bar to the district court's consideration of awarding front pay in lieu of reinstatement. The district court is to use its discretion in deciding whether to grant equitable relief. MacDissi, 856 F. 2d at 1060; Gibson, 695 F. 2d at 1100. Here, the magistrate judge abused his

discretion by applying an incorrect rule of law to procedurally bar consideration of the merits of Williams' claim for front pay.

We therefore remand the front pay issue to the magistrate judge, with directions to consider whether an award of front pay would be equitable. The magistrate judge should keep in mind that "[f]uture damages should not be awarded unless reinstatement is impracticable or impossible . . . . Because future damages are often speculative, the district court, in exercising its discretion, should consider the circumstances of the case, including the availability of liquidated damages." Wildman v. Lerner Stores Corp., 771 F. 2d 605, 616 (1st Cir. 1985). See also Duke v. Uniroyal, Inc., 928 F. 2d 1413, 1424 (4th Cir.) (whether front pay is available is a matter left to discretion of district judge, who "must consider a host of

factors, including whether reinstatement is practical"), cert. denied, 112 S. Ct. 429 (1991).

III.

Williams argues that the magistrate judge erred in not finding Valentec Kisco liable on his race discrimination claims. The judge found against Williams on his Title VII claim after the jury found against him on his section 1981 claim.[5]

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[5]Submission of the discriminatory discharge claim under section 1981 may have given Williams more than he would have been entitled to at certain periods during the past several years. Such a case was submissible at the time of trial but later was not. See Hicks v. Brown Group, Inc., 902 F. 2d 630, 635-48 (8th Cir. 1990), cert. granted, 111 S. Ct. 1299 (1991) (remanded for further consideration in light of Taggart v. Jefferson County Child Support Enforcement Unit, 935 F. 2d 947 (8th Cir. 1991)); Hicks, 946 F. 2d 1344 (8th Cir. 1991) (overruling original decision in light of Taggart and Patterson v. McLean Credit Union, 491 U.S. 164 (1989)). The Civil Rights Act of 1991 now allows such an action under section 1981, but we have recently held the Act to be nonretroactive. Fray v. Omaha World Herald

(continued . . .)

Williams claims that he established a prima facie case of racial discrimination, and that Valentec Kisco's explanation was pretextual. In essence, Williams attempts to substitute this court as factfinder. The magistrate judge acknowledged the jury's finding and correctly determined that collateral estoppel forced him to reach the same conclusion in Williams' Title VII claim. See McIntosh v. Wienberger, 810 F. 2d 1411, 1429 (8th Cir. 1987) (once jury has made finding on core issue of discrimination in section 1981 action, collateral estoppel precludes district judge from making a contrary finding for purposes of Title VII claim), vacated on other grounds, Turner v. McIntosh, 487 U.S. 1217 (1988). Williams

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[5](. . . continued)
Co., Nos. 91-2439, 91-2442, 91-2713 (8th Cir. Apr. 3, 1992). As the jury rejected his claim, this issue needs no further discussion.

does not address the basis of the magistrate judge's ruling, and there is no error in the approach the court took.

IV.

Williams then argues that Instructions 16 and 20 on the section 1981 race discrimination claim were erroneous because they did not properly advise the jury of the burdens of proof as set out in McDonnell Douglas. Indeed, Williams submitted a six-page instruction requiring the jury to answer specific questions regarding, inter alia, (1) the elements of his prima facie case; (2) articulation of a nondiscriminatory reason for the discharge; (3) pretext; and (4) whether Williams would have been discharged regardless of his race.

The Supreme Court has stressed that the McDonnell Douglas stages of proof method was "'never intended to be rigid, mechanized, or ritualistic,'" Aikens, 460 U.S. at 715 (quoting Furnco Constr. Corp.

v. Waters, 438 U.S. 567, 577 (1978)). Likewise, we have held that the McDonnell Douglas "ritual is not well suited as a detailed instruction to the jury" and adds little understanding to deciding the ultimate question of discrimination. Trebin v. Sioux Falls Indep. Sch. Dist., 779 F. 2d 18, 20 (8th Cir. 1985).[6] See also Loeb v. Textron, Inc., 600 F. 2d 1003, 1016-17 (1st Cir. 1979). We pointed out in Grebin that the McDonnell Douglas analysis was articulated in a court-tried case, and observed that it is far more applicable to a bench trial than to deliberations of a jury. Once a full record has been developed, as it was in this case, the factfinder should proceed to the specific question of whether

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[6]Foster v. University of Arkansas, 938 F. 2d 111, 115 (8th Cir. 1991), while stating that Price Waterhouse superseded Grebin, discusses only the phrase "a determining factor" in a jury instruction, and does not deal with the issue before us.

the action of the employer was discriminatory. See Aikens, 460 U.S. at 715.

Instructions 16 and 20 submitted the ultimate issue of whether race was a motivating factor in the discharge decision. They informed the jury that Williams was not required to produce direct evidence of unlawful motive, and that intentional discrimination is seldom admitted but may be inferred from the existence of other facts. In addition to these two instructions, another instruction given to the jury stated that "Plaintiff has the burden of proving that [Valentec's] stated reason [for discharge] was a mere pretext or a cover-up for plaintiff's discharge on the basis of [race]." As an appeals court, we read the instructions as a whole and consider them in light of the entire charge. Crimm v. Missouri Pac. R.R., 750 F. 2d 703, 711 (8th Cir. 1984). Here, the instructions were adequate.

Further, the form and language of jury instructions are committed to the sound discretion of the district judge so long as the jury is correctly instructed on the substantive issues in the case. See Federal Enter., Inc. v. Greyhound Leasing & Fin. Corp., 786 F. 2d 817, 820 (8th Cir. 1986). The magistrate judge did not err in instructing the jury in this case.

We affirm the magistrate judge's judgment in all respects, except for the issue of front pay, which we remand for further consideration in light of this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

(Filed June 11, 1992)

JAMES WILLIAMS, Appellee, v. VALENTEC KISCO, INC., Appellant	Nos. 90-2909/ 2910/2911EMSL Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

June 11, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals,
Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Filed August 21, 1990)

JAMES WILLIAMS,	)	
	)	
Plaintiff,	)	No. 88-1468C4
	)	
v.	)	JUDGMENT AND ORDER
VALENTEC KISCO, INC.,	)	
	)	
Defendant.	)	
	)	

Plaintiff James Williams brought this action pursuant to 42 U.S.C. § 1981, 29 U.S.C. § 621 et seq., and Title VII of the Civil Rights Act, 42 U.S.C. § 2000-e et seq. Plaintiff alleges that he was terminated from his position in a munitions factory of defendant Valentec Kisco, Inc. due to his age and race.

In accordance with the general procedures, plaintiff's claims under 42

U.S.C. § 1981 and 29 U.S.C. § 621 were tried to a jury and a verdict was returned in favor of the defendant on plaintiff's claim of racial discrimination pursuant to § 1981 and in favor of plaintiff on plaintiff's claim of age discrimination pursuant to 29 U.S.C. § 621, while plaintiff's claim of racial discrimination pursuant to Title VII was tried to the court.

The court, upon consideration of the testimony and evidence adduced at trial, and the exhibits presented and the applicable law, now enters its findings of fact and conclusions of law in the accompanying memorandum filed this day, finding in favor of defendant, Valentec Kisco, Inc., on plaintiff's claim under Title VII Civil Rights Act 42 U.S.C. § 2000e. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be and is entered on

this date in favor of defendant, Valentec Kisco, Inc., on plaintiff's claim pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000-e et seq.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be and is entered on this date in favor of defendant, Valentec Kisco, Inc., on plaintiff's claim pursuant to 42 U.S.C. § 1981.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be and is entered on this date in favor of plaintiff James Williams, on plaintiff's claim pursuant to 29 U.S.C. § 621.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff be and is awarded the sum of $85,000.00 in compensatory damages.

Robert D. Kingsland
UNITED STATES MAGISTRATE

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Filed August 21, 1990)

JAMES WILLIAMS, Plaintiff,	No. 88-1468C4
v.	MEMORANDUM, FINDINGS OF FACT AND CONCLUSIONS OF LAW
VALENTEC KISCO, INC., Defendant.	

MEMORANDUM

This matter comes before the court for a decision on the merits of plaintiff's claim pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) et seq. Plaintiff alleges defendant discriminated against him because of his race and seeks damages. Plaintiff's claims for racial discrimination pursuant to 28 U.S.C. § 1981 and for age discrimination pursuant to 29

U.S.C. § 621 were tried to a jury, which rendered its verdict.

The court having considered the pleadings, exhibits, testimony at trial, and the applicable law, hereby makes the following findings of fact and conclusions of law in accordance with rule 52 of the Federal Rules of Civil Procedure. Any findings of fact equally applicable as a conclusion of law is hereby adopted as such, and any conclusion of law applicable as a finding of fact is adopted as such.

FINDINGS OF FACT

1. Plaintiff James W. Williams is a 55-year-old black male living at 6216 Bailey Place, St. Louis, Missouri 63121. Plaintiff was born on June 6, 1935.

2. Defendant Valentec Kisco, Inc. (Valentec) is a corporation licensed to do business in the State of Missouri and is doing business in St. Louis, Missouri. Valentec is a manufacturer of projectile

grenades and other military items. In 1987, Valentec employed in excess of 275 hourly workers.

3. Mr. Williams was employed by Valentec beginning in 1973. He was laid off in the mid-1970's, but he was employed steadily by Valentec from the mid-70's. He was last employed by Valentec in March, 1987, at which time he was discharged.

4. At the time of discharge, plaintiff was 51 years of age, a black male and living in St. Louis County, Missouri.

5. In 1986, Mr. Williams worked on Valentec's second shift in a position on the assembly line, in which he was responsible for checking grenades as they went throughout the assembly line.

6. Plaintiff had prostate surgery in 1986, a condition which was unrelated to his employment.

7. In February of 1987, plaintiff transferred from the third shift to the

second shift, exercising his seniority rights to transfer back to the second shift and bump the least senior person on the second shift.

8. Mr. Williams worked on the second shift in the sealer position for approximately one week prior to his suspension from Valentec on March 11, 1987. In the sealer position, Mr. Williams was required to vacuum seal boxes of projectile grenades and place them on a pallet for shipping. The boxes of grenades weighed approximately 67 pounds, and Mr. Williams was required to lift the boxes by hand and place them on the pallets.

9. On March 11, 1987, Mr. Williams arrived at work at approximately 3:00 p.m. and worked in the sealer position for several hours.

10. In performing the sealer job a pallet is placed approximately two to four feet from the assembly line. The two motor

or forklift is shared between several departments. The pallet is mechanically lifted into the isle were it awaits being filled manually by the sealer and is later carried away to shipping.

11. At the time of the incident, the pallet plaintiff was loading was several boxes short of being full. The pallet was located approximately ten to twelve feet from the sealer position. The pallet had been moved by order of plaintiff's supervisor, Valentec foreman, Norman Leigh.

12. Mr. Williams then attempted to use a two-wheeler (a dolly) to move the boxes of grenades from the sealer position to the pallet. Plaintiff in the past had used the two-wheeler to move boxes of grenades. When plaintiff attempted to get a dolly in order to move the boxes, he was prevented from doing so by Mr. Leigh, the foreman on duty, from using the two-wheeler to move the grenades to the pallet.

13. When plaintiff refused to do the job as directed by the foreman, plaintiff was ordered to report to Mr. Leigh's office. Mr. Leigh indicated that Mr. Williams would be fired. At the time Mr. Leigh advised Mr. Williams that he was suspended, Mr. Williams left the Valentec facility. A discipline report was prepared regarding Mr. Williams' suspension. Mr. Williams was suspended for "refusal to accept assignment."

14. Plaintiff went to his union. However, the union did not take his grievance to arbitration.

15. Valentec conducted an investigation regarding the circumstances of Mr. Williams' suspension. This investigation was conducted by Valentec personnel specialist Vancie Bush. She discussed the circumstances of the suspension with Mr. Lee (sic) but never discussed the circumstances with Mr.

Williams. A short time after his suspension, Mr. Williams was advised that his suspension had been changed to termination.

16. Mr. Williams was replaced by a 30-year-old black male, Kenneth Harris. Approximately two weeks after Mr. Harris started the job, he went on medical leave. Mr. Harris was replaced by Charles Mandina, a 20-year-old white male.

CONCLUSIONS OF LAW

This court has jurisdiction pursuant to 42 U.S.C. § 2000(e)-5(f). Plaintiff has satisfied the procedural requirements of Title VII and timely filed this complaint. Plaintiff's claim of racial discrimination pursuant to 42 U.S.C. § 1981, was tried to a jury which found for the defendant on the claim of race discrimination. The jury found for the plaintiff on plaintiff's claim for age discrimination pursuant to 29 U.S.C. § 621 and awarded plaintiff

$85,000.00 in back pay. In McIntosh v. Weinberger, 810 F. 2d 1411, 1429 (8th Cir. 1987), the Eighth Circuit held that a prior jury determination of a § 1981 action ordinarily precludes by collateral estoppel a contrary result under Title VII. Therefore, plaintiff's claim for race discrimination pursuant to Title VII, 42 U.S.C. § 2000(e), must also be denied.

Plaintiff carries the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Once plaintiff has made a prima facie case of discrimination the defendant may rebut allegations of racial discrimination by articulating a legitimate nondiscriminatory reason for defendant's actions. The burden then shifts to the plaintiff to prove that the reasons articulated are mere pretext. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); McDonnell Douglas Corp. v. Green, 411 U.S.

792 (1973); Johnson v. Legal Services of Arkansas, Inc., et al., 813 F. 2d 893, 896 (8th Cir. 1987).

The jury found that the defendant did not discriminate against plaintiff in discharging him. The court agrees. In light of the juries verdict, plaintiff's claim of racial discrimination pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) is denied.

Robert D. Kingsland
UNITED STATES MAGISTRATE

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Filed August 21, 1990)

JAMES WILLIAMS, Plaintiff, v. VALENTEC KISCO, INC., Defendant.	No. 88-1468C4 ORDER

This matter is before the court on plaintiff's motion for the award of liquidated damages and front pay and defendant's motions to reopen proceedings and for judgment notwithstanding the verdict.

Prior to the start of trial, a conference was held in chambers in which the undersigned heard arguments on the parties' motions in limine. An agreement was reached that certain evidence would be

excluded from trial if plaintiff would not seek damages other than compensatory damages. Plaintiff's counsel stated on the record that he would not pursue punitive damages on either plaintiff's race or age claim. Plaintiff now moves for the award of liquidated damages. As all parties are aware, punitive damages are not available in an age discrimination case under 29 U.S.C. § 626. Liquidated damages, intended by Congress to be punitive in nature, are available in an action for age discrimination. Trans-World Airline, Inc. v. Thurston, 469 U.S. 111, 105 S. CT. 613, 83 L. Ed. 2d 35 (1985).

Plaintiff has clearly waived any claim to liquidated damages in this case. Further, this court finds plaintiff's counsel's action in pursuing such damages worthy of sanction. However, none will be assessed.

Plaintiff also moves for an award of front pay. Front pay damages may be awarded in lieu of reinstatement of plaintiff where reinstatement is impracticable or impossible, however, such damages cannot be awarded where no claim for reinstatement is made in the litigation. Wehr v. Burroughs Corporation, 619 F. 2d 276, 283 (3rd Cir. 1980); Greene v. Union Mutual Life Insurance Company, 635 F. Supp. 1437 (D. Me. 1986); Monroe v. Penn-Dixie Cement Corp., 355 F. Supp. 231, 235 (N.D. Ga. 1971). There is no remedy sought "in lieu of" which "front pay" damages may be awarded. Plaintiff did not request reinstatement and therefore is not entitled to the award of front pay.

IT IS HEREBY ORDERED that plaintiff's motion for liquidated damages and front pay be and is denied.

IT IS FURTHER ORDERED that defendant's motion to reopen the proceedings be denied.

IT IS FURTHER ORDERED that defendant's motion for judgment notwithstanding the verdict is denied.

Robert D. Kingsland
UNITED STATES MAGISTRATE

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Filed September 5, 1990)

JAMES WILLIAMS, Plaintiff, v. VALENTEC KISCO, INC., Defendant.	No. 88-1468C4 ORDER

Defendant's Supplemental Motion for Judgment Notwithstanding the Verdict denied.

Robert D. Kingsland

UNITED STATES MAGISTRATE

Supreme Court, U.S.
FILED
OCT 30 1992
OFFICE OF THE CLERK

(2)

No. 92-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

VALENTEC KISCO, INC.,
Petitioner,

vs.

JAMES WILLIAMS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT JAMES WILLIAMS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under *Burdine*, the contention that in order for an ADEA plaintiff to prove pretext, the plaintiff must not only discredit the employer's proffered reason for the employment decision, but also adduce additional evidence that the employer was motivated by a discriminatory animus, presents an issue worthy of review, particularly where the plaintiff has presented direct evidence of discriminatory animus on the part of the employer.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceeding are respondent, James Williams, an individual, and petitioner, Valentec Kisco, Inc., a corporation. The names of all the parties appear in the caption of the case.

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RESPONDENT JAMES WILLIAMS' BRIEF IN OPPOSITION

OFFICIAL AND UNOFFICIAL CITATIONS

The opinion of the Court of Appeals for the Eighth Circuit in the present case is reported at 964 F.2d 723 (8th Cir. 1992). The decision of the District Court in the present action is unreported.

JURISDICTIONAL STATEMENT

The present action arises under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621-633. The provision of the ADEA involved in the instant case is as follows

> **Prohibition Of Age Discrimination.** (a) Employer Practices. It shall be unlawful for an employer — (1) to fail to

> or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a).

The Court of Appeals affirmed the District Court's judgment that petitioner had discriminated against respondent in his employment on the basis of respondent's age. Because the decision below is correct and does not raise any question warranting review by this Court, respondent James Williams respectfully urges this Court to deny the pending petition.

STATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate and omits pertinent facts. Therefore, Respondent James Williams deems it necessary to make the following statement of the case.

Petitioner manufactures grenades and Army parts. At the time of the events at issue, respondent James Williams was fifty-one years of age. Approximately four and a half months prior to his discharge, respondent switched from the second shift to the third shift at Valentec Kisco. After working on the third shift for some three weeks, respondent asked to be transferred back to the second shift. Respondent's supervisor, Norman Leigh, told respondent that the only job available on the second shift was a sealer position. The sealer position required an employee to lift a box of grenades weighing approximately 67 pounds, seal the box, and load it on to a skid located next to the assembly line. The respondent informed Leigh that he would prefer to stay on the third shift if the sealer position was the only job available. Leigh told respondent that he had to return to the second shift, and respondent returned to second shift. Although Leigh testified that respondent had requested a permanent shift change to the second shift, there existed no documentation in the respondent's file concerning the shift change, as was customary under company rules regarding permanent shift changes.

On March 11, 1987, respondent reported for work, and Leigh assigned respondent his job duties. After working some two and one-half to three hours in the sealer position, respondent took a break. Before respondent went on break, there was a nearly-full skid of boxes respondent had been loading approximately two feet from his position on the assembly line. When respondent returned from break, the skid had been moved from its previous position and no new skid had been put in its place. Leigh told Williams that he had ordered the skid moved in his absence. As a matter of custom, the sealer instructed the skid to be moved away from the assembly line by a tow loader when it was nearly full.

Respondent then obtained a hand dolly located some ten feet from the assembly line, intending to place the grenade boxes on the dolly and move them from the line to the skid Leigh had moved. Leigh told the respondent that he could not use the dolly and ordered respondent to accompany him to the Leigh's office. There, respondent and Leigh were joined by foreman Sam Asbrock and by the shop steward. Leigh told Asbrock what had transpired on the line and that respondent had refused to do his job. Asbrock asked Leigh what he was doing with an "old man carrying the boxes anyway." When the shop steward asked Leigh why he objected to the respondent using the two-wheeler, Leigh stated that he was going to "fire this son of a bitch."

Leigh suspended respondent pending an investigation. The disciplinary report prepared by Leigh stated that respondent had refused to accept his job assignment. While respondent had informed Leigh on that day that he was having medical problems, Leigh did not send respondent to see a doctor as was required by company policy.

There existed no written rule at Valentec Kisco prohibiting employees from using a dolly to move boxes from the line to the skid, nor did company literature state that a dolly could not be

used in this fashion due to any safety hazards. Valentec Kisco's safety rules did state, however, that employees were not to attempt to lift weights that were too heavy for them. Respondent had previously used a dolly to move grenades from one place to another while working on the second shift, and no one had ever informed him during that time that he was not to use the dolly in that fashion.

Petitioner eventually terminated the respondent and replaced him with a thirty-year-old male, who left shortly thereafter on medical leave and was then replaced by a twenty-year-old male.

Respondent filed his First Amended Complaint against petitioner in the United States District Court for the Eastern District of Missouri alleging that petitioner had discharged him because of his age in violation of the ADEA. Respondent's age discrimination claim was submitted to the jury on a *McDonnell Douglas/ Burdine* theory. The jury found in favor of respondent and awarded $85,000 in compensatory damages. Petitioner appealed the judgment in favor of respondent to the United States Court of Appeals for the Eighth Circuit, which affirmed.

REASONS FOR DENYING THE WRIT

Petitioner claims that certiorari is proper to resolve the issue of whether, under the Court's unanimous decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S 248, (1981), an ADEA plaintiff must make a showing of "pretext-plus"[1] in order to prevail. This claim is premised upon what petitioner describes as a "notorious split" in the circuit courts regarding the evidentiary showing necessary for a plaintiff to prove pretext in a disparate treatment action and upon a perceived "ambiguity" in this Court's decision in *Burdine*. (See Petition for Certiorari at page viii, 1,3). Building on these tenuous foundations, plaintiff contends that certiorari is appropriate since a small minority of federal courts interpret *Burdine* to require a dual showing at the pretext stage in which the plaintiff must not only negate the employer's proffered reason for the employment decision but also affirmatively demonstrate that the real reason for the employment decision was discriminatory intent.[2]

In offering this contention, the petitioner does not present an issue worthy of review by this Court. The "pretext-plus" theory

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[1] The "pretext-plus" theory provides that an ADEA claimant cannot meet his burden of proof on pretext simply by refuting or questioning the employer's articulated reason for the adverse employment action. The plaintiff must also present direct evidence showing that the employer was motivated by a discriminatory animus. *See, e.g., Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990); *White v. Vathally*, 732 F.2d 1037, 1042-43 (1st Cir. 1984).

[2] In its Petition for Certiorari, Valentec Kisco adopts the discussion of the "pretext-plus" theory set forth by Katherine Lanctot in an article, "The Defendant Lies and the Plaintiff Loses: The Fallacy of the 'Pretext-Plus' Rule in Employment Discrimination Cases," 43 Hastings Law Journal 59 (November 1991), which rejects the "pretext-plus" rule as "fundamentally inconsistent with traditional principles of employment discrimination law and of evidence." *Lanctot*, 43 Hastings Law Journal at 67.

asserted by petitioner is directly contrary to the long-standing framework for analyzing disparate treatment cases set forth by this Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, and *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). It places an evidentiary burden on plaintiffs that precludes a showing of discrimination through the use of indirect evidence. Moreover, the "pretext-plus" theory is irrelevant to the present case, since respondent presented direct evidence of petitioner's discriminatory animus at trial.

I.

THE WRIT SHOULD BE DENIED BECAUSE THE "PRETEXT-PLUS" THEORY IS IRRELEVANT TO THE PRESENT CASE, SINCE RESPONDENT PRESENTED DIRECT EVIDENCE OF PETITIONER'S DISCRIMINATORY ANIMUS.

The present case is not a proper vehicle in which to grant certiorari for the purpose of addressing a "pretext-plus" issue, since the respondent presented direct evidence of petitioner's discriminatory animus. At trial, respondent reiterated the question asked by foreman Asbrock of respondent's supervisor, Norman Leigh, as to what Leigh was doing with an "old man carrying the boxes anyway." (*See* Opinion, at p. 6, incorporated as Appendix A to Petition for Certiorari). Asbrock was a signatory to the discipline report on respondent prepared by Leigh. This statement constituted direct evidence of discriminatory intent on the part of the petitioner, *see, e.g., Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991); *Clements v. General Accident Insurance Co. of America*, 821 F.2d 489, 492 (8th Cir. 1987), and was recognized as such by the Eighth Circuit. (See, Opinion of the Court of Appeals for the Eighth Circuit, Appendix A, p. 18). Where a plaintiff presents direct evidence of discrimination, the burden shifting test of *Burdine* is inapplicable. *See,*

Trans-World Airlines, Inc., v. Thurston, 469 U.S. 111, 121 (1985); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 358 n.44, (1977). Since the three stage analysis for discrimination cases enunciated in *Burdine* is inapplicable, the "pretext-plus" issue is simply irrelevant to the instant case. For this reason, the facts at issue do not present a proper scenario for this Court to address the "pretext-plus" question. Accordingly, the Petition for Certiorari does not present an issue worthy of review by this Court.

II.

THE WRIT SHOULD BE DENIED BECAUSE THE "PRETEXT-PLUS" THEORY ASSERTED BY PETITIONER IS DIRECTLY CONTRARY TO THE ANALYTICAL FRAMEWORK FOR DISCRIMINATION CASES ESTABLISHED BY THIS COURT IN *MCDONNELL DOUGLAS, BURDINE*, AND *AIKENS* AND PLACES UPON AN EMPLOYMENT DISCRIMINATION PLAINTIFF AN ADDITIONAL EVIDENTIARY BURDEN THAT IS NOWHERE SANCTIONED BY SUPREME COURT PRECEDENT.

The "pretext-plus" theory advanced by the petitioner does not present an issue worthy of review since it is directly contrary to the long-standing analytical framework for disparate treatment discrimination cases established by this court in *McDonnell Douglas, Burdine*, and *Aikens*. Under the *McDonnell Douglas/ Burdine* framework, the analysis proceeds in three stages.[3] First, the plaintiff has the initial burden of establishing a prima facie case of disparate treatment that raises an inference of discriminatory intent. *Burdine*, 405 U.S. at 252-53. Establishment of a prima facie case creates a presumption that the employer unlaw-

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[3] This Court applies Title VII Supreme Court precedent in age discrimination cases to aid in the interpretation of substantive provisions of the ADEA. *See, TWA v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978).

fully discriminated against the employee. *Burdine*, 450 U.S. at 254. If the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff. *Burdine*, 450 U.S. at 254.

Next, the burden shifts to the defendant to rebut the presumption of discrimination by producing evidence of a non-discriminatory reason for its actions. *Burdine*, 450 U.S. at 254. If the employer carries its burden of production, the plaintiff is given the opportunity to demonstrate that the proffered reason is pretextual, that is, it is not the true reason for the employment decision. *Burdine*, 450 U.S. at 256. A plaintiff may meet this burden in one of two ways:

> "*either directly* by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly* by showing that the employer's proffered reason is unworthy of credence."[Emphasis added].

Burdine, 450 U.S. at 256; *Aikens*, 460 U.S. at 716. The *McDonnell Douglas/Burdine* framework requires that a plaintiff prevail at the third stage of a discrimination case where the plaintiff demonstrates that the proferred reason given by the employer is in fact not the true reason for the employment decision. *Aikens*, 460 U.S. at 718, *J.J. Blackman and Brennan*, concurring.

The "pretext-plus" theory advanced by petitioner violates the explicit alternative method of proof enunciated by this Court in *McDonnell Douglas*, *Burdine*, and *Aikens*. These decisions clearly establish that a plaintiff may prove pretext *either directly* by persuading the Court that a discriminatory reason more likely motivated the employer *or indirectly* by showing that the employer's proffered reason is unworthy of credence. *Burdine*, 450 U.S. at 256; *Aikens*, 460 U.S. at 716.

The "pretext-plus" theory advanced by petitioner would permit a discrimination plaintiff to make a submissible case only

when he/she can demonstrate direct evidence of discrimination. Such a limitation violates the clear admonition of this Court that it is reversible error for a trial court to require a plaintiff to produce direct evidence of discrimination.[4] This Court has explicitly held that a discrimination case may be established by indirect evidence. *Thurston*, 469 U.S. at 121; *Aikens*, 460 U.S. at 717; *Burdine*, 450 U.S. at 255-256 n.10. This court established the indirect method of proving pretext because age discrimination, as well as other forms of discrimination, are subtle, and there is very seldom direct evidence of discriminatory animus available. *See, Aikens*, 460 U.S. at 715.

Petitioner has advanced several arguments in support of the "pretext-plus" theory. It suggests that adherence to the *Burdine* model of showing pretext by discrediting the employer's explanation, without requiring a plaintiff to produce additional evidence of discriminatory intent, allows an age discrimination plaintiff to impermissibly shift the ultimate burden of proof to the employer. (*See, Petition for Certiorari* at 19-21). This assertion is groundless and ignores the *explicit* holding of this Court in *Burdine* that permits a plaintiff to prove pretext "indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256.

Petitioner claims the "pretext-plus" theory is supported by language in *Burdine* indicating that where defendant has presented a legitimate reason for its actions the burden of proving pretext merges with the plaintiff's ultimate burden of proving discrimination. Petitioner's argument is misplaced. In its proper

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[4] *See, Aikens*, 460 U.S. at 714 n.3 ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever credence it deserves . . . [T]he district court should not have required the plaintiff to submit direct evidence of discriminatory intent."). *See also, International Brotherhood of Teamsters v. U.S.*, 413 U.S. 324, 358 n.44 (1977) ("The *McDonnell Douglas* formula does not require direct proof of discrimination.")

context, this language clearly indicates that once a defendant has stated a legitimate reason for its actions, the plaintiff's burden is to prove discrimination either by direct evidence, or indirect evidence (by showing defendant's stated reason is pretextual). The language of the Court could not be any clearer: A plaintiff may meet his ultimate burden in an age discrimination case by discrediting the employer's proffered reason. No additional evidence is needed for the plaintiff to prove intentional discrimination.[5] Thus, petitioner's claim that the plaintiff's retention of the burden of proof requires additional evidence of discriminatory intent in order for the plaintiff to prevail is without support in *Burdine* or its progeny. A plaintiff's reliance on proof that the employer lied about the reasons for its employment decision simply does not shift the burden of proof to the employer.

Finally, petitioner argues that there is a split of authority in the circuits regarding the *Burdine* holding. This purported split is more philosophical than real. It arises from a misreading of *Burdine* and other Supreme Court precedent by a small minority of federal courts and apparently is fueled by a desire to reduce the number of discrimination cases pending on federal dockets. While some may believe that reducing the number of discrimination cases pending on federal dockets is a proper goal, this Court should not reach that goal by placing an insuperable evidentiary burden on age discrimination plaintiffs that is wholly unsupported by Court precedent.

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[5] This Court has stated that once all legitimate reasons have been eliminated for an employer's conduct, it is fair to assume that the only remaining reason is discrimination. *Furnco Construction Co v. Waters*, 438 U.S. 567 (1978). It is on this principle that the entire *Burdine* indirect prong analysis is based. Therefore, when the only legitimate reason offered by the defendant turns out to be untrue, it is entirely consistent with this Court's precedent to presume that it is more likely than not that the employer, who is generally assumed to act only with some reason, based his decision upon an impermissible consideration such as age or race. *Furnco, supra*, 438 U.S. at 577.

CONCLUSION

The decision of the Court of Appeals is correct and fully comports with the decisions of this Court. The Petition for Writ of Certiorari presents no issue worthy of this Court's consideration, and it should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari were served upon Petitioner Valentec Kisco by mailing same by ordinary first class mail, postage prepaid, to William T. Weidle, Jr., Attorney for Petitioner, at 4232 Forest Park Blvd., St. Louis, MO 63108 on this 30th day of October, 1992.

Brian N. Brink
Mary Anne Lindsey